Supreme Court, U.S.
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No. 00-544

IN THE

**SUPREME COURT OF THE UNITED STATES**

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PATRICIA KIDD,

*Petitioner*,

v.

DISTRICT OF COLUMBIA, ET AL.,

*Respondents*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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**BRIEF IN OPPOSITION**

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# BRIEF IN OPPOSITION

## OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, *Kidd v. District of Columbia*, Pet.App. 1a-21a,[1] is reported at 206 F.3d 36 (D.C. Cir. 2000).

## COUNTER-STATEMENT OF THE CASE

The petition requires us to provide a fuller picture of the facts.

### 1. Background

Petitioner, Patricia Kidd, is a former District Government employee, who worked in the D.C. Department of Administrative Services (DAS). She filed a suit for sexual harassment and

[1] "Pet.App." refers to the appendix to the petition.

intentional infliction of emotional distress against her former supervisor, Melvin Carter; his supervisor, Robert King; the Director of DAS, Raymond Lambert; and the District of Columbia, based on events in 1987 and 1988, during the administration of Mayor Marion Barry. After the trial court directed a verdict in favor of Lambert and the District on the sexual harassment claim, a jury found Carter liable under both the sexual harassment and the emotional distress claims; found appellants Lambert and King liable under the emotional distress claim; found in favor of the District on the emotional distress claim; and found in favor of King on the sexual harassment claim. The District of Columbia Court of Appeals reversed the verdict against Lambert. See *King v. Kidd*, 640 A.2d 656, 658-659 (D.C. 1993).

In October, 1990, after the trial, Kidd returned to work for DAS under the supervision of Jeannette Wills. Affidavit of Jeannette Wills, D.C.Cir.App. 358.[2] In January 1991, Sharon Pratt Kelly became the Mayor of the District, and Ric Murphy replaced Lambert as DAS Director. *Id.*

Immediately upon her return, Kidd, who had been ordered promoted retroactively to a DS-11 by the court, requested immediate promotion to a DS-12. *Id.* at 359. However, the Mayor had imposed a freeze on promotions and filling vacancies for all District employees. *Id.* Moreover, Wills explained to Kidd that promotion was not automatic under the personnel regulations, even in the absence of a freeze, and, in any case, she did not think that Kidd's performance deserved promotion yet. She would, however,

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[2]"D.C.Cir.App." refers to the Appendix of the case in the D.C. Circuit filed by *amicus curiae* who was appointed by that Court to file a brief in support of Kidd's position and is now representing Kidd before this Court.

work with Kidd to give her the necessary experience and assignments for promotion. *Id.* 359-360. Kidd also sought promotion by applying to what she thought were vacancies cased by the resignation of other staff; however, these positions were not advertised or filled. *Id.* 359.

Wills stated that Kidd did not need to interact with Carter, her former supervisor, as he was on another floor, the basement. He soon left the District Government. *Id.* 360-361. King, although in the chain of command, distanced himself from matters involving Kidd and eventually left the District Government. *Id.*[3]

In November, 1990, Lambert, the new DAS Director, announced a reorganization of DAS. The duties of all employees of the division to which Kidd was assigned were affected. Some employees at a higher level than Kidd were given responsibilities below their grade levels. *Id.* 361-362; Affidavit of Lorraine Britton, DAS Deputy Director, *id.* 403. Kidd also requested training opportunities, but DAS's tight budget situation resulted in the denial of many training requests. Wills Affidavit, *id.* 363.

Kidd was absent for several extended periods, and, although she had no sick leave, was given 180 hours of advanced sick leave

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[3]The statement in Kidd's petition that "[w]hen she returned to work immediately after the trial, she was placed back under the supervision of the very same individuals who had just been found personally liable to her," Pet. 8, is misleading since it omits the critical fact that Kidd's immediate supervisor, and the only person with whom Kidd had daily contact, was Jeanette Wills–a person who had absolutely no involvement with Kidd's previous claims. The passage from the D.C. Circuit decision cited is much more qualified. Pet.App. 3a.

in 1991. *Id.* 364. Wills consistently gave Kidd performance evaluations of "excellent." *Id.* 365.

After Kidd requested to work in a position outside of DAS, DAS Director Murphy arranged for transfer. Britton Affidavit, *id.* 405. However, when Kidd was given the opportunity to apply for a DS-12 position as a contract specialist in the D.C. Department of Human Services (DHS), she frustrated the process by failing to submit writing samples requested as part of the application. Affidavit of Patricia Watts, *id.* 350.

DAS Director Murphy then requested, and received, a waiver from the freeze on personnel movement from the City Administrator to permit Kidd to be reassigned to the D.C. Department of Assisted Housing (DPAH), and detailed her there immediately. Britton Affidavit, *id.* 406. However, Kidd returned to DAS at the end of her detail in August, 1992. *Id.* 407. Nevertheless, Kidd abruptly left work on September 1, 1992, and never returned. *Id.*

On September 4, 1992, Kidd reported that she was on medical leave, and again was given advance sick leave, although she still owed 111 hours of leave. *Id.* When she did not return or provide medical documentation for her absence, she was put on AWOL. She submitted a letter of resignation in July 1993. *Id.*

**2. EEOC Determination Letter Rejecting Kidd's Charges**

Before Kidd filed suit, she filed charges with the United States Equal Employment Opportunity Commission (EEOC) under Title VII of the Civil Rights Act of 1964 and the Equal Pay Act. EEOC found the charges unsupported:

> There is no evidence to indicate that Respondent has retaliated against Charging Party because she filed a previous charge by denying her a promotion to DS-12, or that she was paid less than similarly

> situated males, harassed and intimidated, and denied a reassignment. The record shows that she has received the same treatment and salary as similarly situated employees.

EEOC Determination Letter of September 22, 1992, D.C.Cir.App. 73.

### 3. Kidd's Complaint and the District Court's Dismissal of the Bulk of Her Claims.

On December 30, 1992, Kidd filed a complaint against the District of Columbia and various officers and employees alleging the same violations. *See* Complaint, D.C.Cir.App. 48. Although technically *pro se*, Kidd was represented by six lawyers during her litigation in the district court.[4] The court attempted on several occasions to appoint pro bono counsel but, but they all withdrew, and finally the court ordered her to proceed *pro se*. Pet.App. 3a.

On October 5, 1993, the district court entered an order advising Kidd of her obligations under the Federal Rules of Civil Procedure and rules of the district court, specifically, Fed.R.Civ.P. 6(e), 12(b), 56(c), and 56(e) and Local Rules 108(b) and 108(h), which were set forth in full. D.C.Cir.Supp.App. 1-4[5]. With respect to Local Rule 108(h), she was advised that "[t]he Court will

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[4]Carla M. Macklin, Esq., of Dickstein Shapiro Morin & Oshinsky, LLP, D.C.Cir.App.1; Roger C. Johnson, Esq., of Koonz, McKenney, *id.*; Carol M. Gordon, Esq., *id.* 262; Gwendolyn Ray Bennett, Esq., *id.* 13; Rogers C. Johns, Esq., *id.* 7; Thomas C. Papson, Esq., *id.* *See also*, Pet.App. 42a.

[5]"D.C.Cir.Supp.App." refers to the Supplemental Appendix of Appellees (defendants) filed in the D.C. Circuit.

accept as true any factual assertions contained in affidavits or attachments submitted by the defendant in support of its motion to dismiss unless the plaintiff submits its own affidavits or documentary evidence showing that the defendant's assertions are untrue." *Id.* 3.

On August 3, 1994, the district court issued a Memorandum Opinion, granting the bulk of defendants' motion to dismiss for failure to state a claim upon which relief could be granted, including Kidd's claims against the Mayor, the Director of the D.C. Office of Employee Appeals, the D.C. Corporation Counsel, and several members of his office. The court also dismissed Kidd's claim under the Equal Pay Act of 1964, 29 U.S.C. § 206(d), because "she has made no specific allegations to indicate that she was paid a lesser wage in comparison to other workers performing the same duties." Pet.App. 45a. Finally, the court dismissed Kidd's claims under 42 U.S.C. §§ 1981, 1983, and 1985, holding that she "has not supplied any allegations that she was denied advancement on the basis of racial discrimination"; she failed to indicate "what or how her Constitutional or statutory rights were infringed by the defendants"; and she "does not allege any facts suggesting a class based discrimination or racial motives." Pet.App. 46a-47a.

The court denied, without prejudice, defendants' motion to dismiss Kidd's claims of retaliation and constructive discharge under Title VII of the Civil Rights Act, explaining that, although she had not established a *prima facie* case of retaliation and constructive discharge, she might be able to do so if she were allowed to replead her case. The court noted that, to meet these requirements, she needed to explain specifically what retaliatory acts were committed against her and who committed these acts, rather than making general statements. Pet.App. 49a-51a.

### 4. Motions for Summary Judgment

Kidd filed an amended complaint repleading the remaining counts as well as a new complaint based on § 704 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the court consolidated the actions and referred them to a magistrate judge for a report and recommendation. Among the orders issued by the magistrate judge was an order, filed May 15, 1996, similar to the district court's order of October 5, 1993, advising Kidd of her obligations under the Federal Rules of Civil Procedure and Local Rule 108(h). D.C.Cir.Supp.App. 31-34.

On February 6, 1997, defendants filed a motion to dismiss or, in the alternative, for summary judgment, *id.* 35, which was accompanied by a Statement of Material Facts Not in Dispute, supported by affidavits and other documents. D.C.Cir.App. 343-344.[6] Kidd filed a motion for partial summary judgment. *Id.* 285.

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[6]Defendants also argued that they were entitled to judgment because Kidd had failed to file suit within 90 days of receiving the right-to-sue letter from the EEOC. D.C.Cir.App. 302-303. *See* 42 U.S.C. § 2000e-5(f)(1); *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 577 (D.C. Cir. 1998) (suit filed 92 days after receipt of right-to-sue letter barred as untimely). The EEOC letter was dated September 22, 1992, D.C.Cir.App. 74, but she did not file suit until December 30, 1992, *id.* 48--98 days later. Kidd attached a certified envelope from EEOC, dated October 29, 1994--37 days after the date of the letter--and implied that the letter was contained in that envelope. *Id. 76.* However, defendants argued that the envelope was not the one that accompanied the right-to-sue letter, and Kidd did not respond to this argument. *Id.* 303 n.2.

### 5. Report and Recommendation of Magistrate Judge

On February 23, 1997, the magistrate judge issued a report and recommendation to grant defendants' motion for summary judgment. Pet.App. 52a. The magistrate judge observed that, whereas defendants' motion was accompanied by a separate statement of material facts not in dispute, supported with affidavits complying with the requirements of Fed.R.Civ.P. 56(e), Kidd's motion and opposition were not so supported. Pet.App. 57a. Specifically, the magistrate judge found that Kidd had failed to comply with Fed.R.Civ.P. 56(c) or (e) or Local Rule 108(h) either in her motion for partial summary judgment or her opposition to defendants' motion. Pet.App. 57a. Citing defendants' Memorandum and its Opposition and Reply, supporting its motion for summary judgment, the magistrate judge found that there was no genuine issue as to any material fact concerning Kidd's nonpromotion, training opportunities, reduced duties, performance evaluations, return to the agency for which she formerly worked, and rights under the Rehabilitation Act. *Id.* The magistrate judge concluded that Kidd's motion and opposition were "almost entirely comprised of her opinions of defendants' actions and characterizations of various statutes and decisions." *Id.* 58a; *see id.* 10a n.1.

### 6. District Court's Final Order and Kidd's Appeal

On March 20, 1998, the district court issued the order in question, which resolved all of Kidd's remaining claims. It adopted magistrate judge's report and recommendation, granted defendants' motion for summary judgment, and denied Kidd's motion for partial summary judgment. Pet.App. 24a-25a. The order was docketed the same day. *See* Civil Docket, D.C.Cir.App. 46.

On April 30, 1998, Kidd filed a notice of appeal with the D.C. Circuit. Pet.App. 32a. She attached an affidavit implying that she

had not personally received notice of the final order. *Id.* 37a-38a.

### 7. Decision of D.C. Circuit Dismissing Appeal

A panel majority of the D.C. Circuit dismissed the appeal as untimely since it was filed more than 30 days after the final order of the district court entered on March 20, 1998. The court noted that the time limits established by F.R.A.P. 4(a) are "mandatory and jurisdictional," and observed that Kidd had not attempted to seek an extension of time from the district court for filing her appeal under F.R.A.P. 4(a)(5) or (6). Pet.App. 4a-5a.

The court rejected Kidd's argument that the district court's order failed to satisfy Fed.R.Civ.P. 58 and, thus, that the time for appeal never started running. The court explained that the "separate document" requirement of that rule, based on the Advisory Committee's Note to the 1963 amendment to the rule, "was designed chiefly to distinguish an actual judgment from 'an opinion or memorandum containing some apparently directive or dispositive words'" *(citing* the Note) and, thus, that the court had "understood Rule 58 as requiring that 'the inclusion of legal reasoning and authority' not go to the point of making 'an order into a combined decision and order.'" Pet.App. 5a, *citing Diamond v. McKenzie*, 770 F.2d 225, 230 n.10 (D.C. Cir. 1985). The court acknowledged that Rule 58 must be "mechanically" applied but observed that "it is one thing to say that Rule 58 creates a straightjacket, another to define the straightjacket's precise measurements." Pet.App. 6a. The court concluded that "some explanation [in a final order] is acceptable–so long as it is very sparse" and that "trivial departures [from the official judgment forms, see Fed.R.Civ.P. app. Forms 31, 32] must be tolerated in the name of common sense." Pet.App. 6a-7a, *quoting Diamond*, 770 F.2d at 234.

The court held that the order in question was a Rule 58

judgment because "[a]part from a reference to the motions being decided, and one conclusory sentence of justification, it consists simply of ordering clauses." Pet.App. 7a. The court rejected Kidd's argument that this Court's decision in *Shalala v. Schaefer*, 509 U.S. 292 (1993) stood for the proposition that a district court's adoption of a magistrate judge's report and recommendation violated Rule 58, noting that the issue of the district court's compliance with Rule 58 was not before the Court. Pet.App. 8a.

Judge Tatel dissented, expressing the belief that the district court's order did not qualify as a Rule 58 order, because the order "contained the district court's reasoning." Pet.App.15a. However, he acknowledged that "an order 'does not lose its character as a separate document simply because it includes a one-sentence explanation of what the order is all about, or a recital that a magistrate's report and recommendation are being adopted.'" *Id.* 16a, *quoting Diamond, supra,* 770 F.2d at 234. He argued for a "bright line rule" in which "[o]rders containing the district court's reasoning . . . are not judgment within the meaning of Rule 58." Pet.App.17a.

The D.C. Circuit denied rehearing. Pet.App. 27a. Judge Tatel again dissented in a one-paragraph statement joined by three other judges. Pet.App.30a.

## REASONS FOR DENYING THE PETITION

**The District Court's order adopting the magistrate judge's report and granting defendants summary judgment as to all remaining claims, which contained no findings, citations, or analysis, complied with the separate document requirement of Fed.R.Civ.P. 58.**

The petition presents two distinct questions for this Court's

consideration--namely, whether a district court's dispositive order satisfies the separate document requirement of Fed.R.Civ.P. 58 if it (1) "contain[s] an explanation of the court's reasoning" or (2) "adopt[s] the report and recommendation of a magistrate judge." Pet. i. Kidd's argument, however, conflates these two issues, referring to each as the single "issue" in this case, *see* Pet. 12, and citing authority concerning one issue in support of the other. Although both issues must be considered in light of the purpose of the separate document requirement, they raise different concerns, which we will address separately.

### A. The basic purpose of the separate document requirement is to prevent the uncertainty created by a combined decision and order.

The purpose of the separate document requirement is explained in the Advisory Committee Note to the 1963 amendment to Rule 58. The Note states that the requirement was added to Rule 58 in 1963 because of the difficulties arising from the practice of some district courts of combining opinions or memoranda with dispositive orders, which in some cases created doubts as to when the period for noting an appeal started to run, and that:

> The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document--distinct from any opinion or memorandum--which provides the basis for the entry of judgment.

28 U.S.C.A. Fed.R.Civ.P. 58, *Advisory Committee Note*, at 36 (1992). See *United States v. Indrelunas*, 411 U.S. 216, 220 (1973). Thus, the essential purpose of the separate document requirement is to prevent the uncertainty created by a combined decision and order.

**B. The D.C. Circuit's holding that the district court's inclusion in its dispositive order of one conclusory sentence of justification did not violate the separate document requirement is consistent with the decisions of all circuit courts that have addressed this issue.**

Kidd's first question is whether the district court's inclusion of a sentence "containing an explanation of the court's reasoning" in a dispositive order violates the separate document requirement. The sentence in question reads as follows:

> In her objection, Plaintiff still fails to raise any genuine issues of material fact in this recent filing and does not set forth any arguments that would cause the Court to reject Magistrate Judge Robinson's Report and Recommendation.

Order of March 20, 1998, Pet.App. 24a. As noted, the D.C. Circuit held that it did not, observing, "[a]part from a reference to the motions being decided, and one conclusory sentence of justification, [the order] consists simply of ordering clauses." Pet.App. 7a.

It is an overstatement to describe this sentence as "containing the court's reasoning." The sentence does not purport to give reasons. It makes no mention of any factual issues that Kidd raised or arguments she made, nor does it explain why the court found the facts deficient or her arguments unconvincing. It simply paraphrases the key prerequisites of judgment under Fed.R.Civ.P. 56(c)–namely, that:

> . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together

> with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Therefore, the court's sentence is essentially a statement that there is no basis in the record for not entering summary judgment; it is otherwise contentless.

However, even assuming this sentence contained the court's "reasoning," there is no conflict in the circuits on Kidd's first question. Most of the circuits have not confronted the issue, and this general silence is an indication that the issue is not of widespread concern. Those circuits that have done so agree that the addition of a short explanation in a dispositive order does not violate the separate document requirement. See *Nunez-Soto v. Alvarado*, 956 F.2d 1, 2 (1st Cir. 1992) (addition of single explanatory sentence not sufficient to transform judgment into memorandum or opinion); *Weinberger v. United States*, 559 F.2d 401, 402 and n. 1 (5th Cir. 1977) (order containing a short explanation and citation of authority satisfied Rule 58, observing that just because *Indrelunas* states that Rule 58 is to be "mechanically" applied does not mean that it is to be "mindlessly" applied); *Pacific Employers Ins. Co. v. Domino's Pizza, Inc.*, 144 F.3d 1270 (9th Cir. 1998) (amended judgment satisfied Rule 58 even though it contained references to the district court's proceedings and decisions on motion to alter original judgment); *Hamilton v. Nakai*, 453 F.2d 152, 155 (9th Cir.), *cert. denied*, 406 U.S. 945 (1972); *Diamond v. McKenzie*, 770 F.2d 225, 229-230 (D.C. Cir. 1985).

Dissenting Judge Tatel argues that the number of sentences should not be the test, suggesting that it should make no difference if the sentence in question were divided in two. Pet.App. 15a.

However, the focus of the D.C. Circuit's decision, and that of the decisions of other circuits that have addressed the issue, was not the number of sentences, but the terseness of the language and the absence of facts, law, or analysis.

The Tenth Circuit has not directly addressed the precise issue. *Laidley v. McClain*, 914 F.2d 1386, 1390 (10th Cir. 1990), established that an order complies with Rule 58 if it "contains no discussion of the reasoning behind the court's decision"; "cannot be considered to be an opinion or memorandum"; and "was clearly intended to be the final directive of the court disposing of all the claims." That standard does not preclude the acceptance of an order that contains a single explanatory sentence. Other Tenth Circuit decisions holding that Rule 58 was violated involve much more elaborate orders, which are clearly distinguishable from the order in question. See *Deboard v. Sunshine Mining & Ref. Co.*, 208 F.3d 1228, 1237 (10th Cir. 2000) (6-page order containing legal analysis and reasoning); *Clough v. Rush*, 959 F.2d 182, 185 (10th Cir. 1992) (15-page order).

Kidd also notes that the Second Circuit uniquely requires that a dispositive order be captioned "judgment." See *Cooper v. Town of East Hampton*, 83 F.3d 31, 34 (2d Cir. 1996). The D.C. Circuit and other circuits have rejected this interpretation. *See* Pet.App. 11a n.2 (citing cases). This, of course, is a distinct issue, which petitioner has not raised either in her petition or in the D.C. Circuit. In any case, the order in question expressly grants summary "judgment" to defendants. It should also be noted that Fed.R.Civ.P. 54(a) provides that "'judgment' as used in these rules includes . . . any *order* from which an appeal lies." (Emphasis added.) Pet.App. 1a n.2 (citing cases).

Kidd also relies upon four unpublished circuit court decisions, which she includes in a separate appendix. However, these cases

do not support her position, but undercut it. In *Anderson v. Pierce*, 770 F.2d 165, 1985 WL 12815 (6th Cir. 1985), the court held that an order dismissing plaintiff's suit was not final where the district court's later issuance of another order relating to the case made the finality of the first order questionable--a case clearly distinguishable on the facts. Similarly distinguishable is *Engler v. Township of Spring Valley*, 924 F.2d 1057, 1991 WL 15148 (6th Cir. 1991), which *dismissed* as untimely an interlocutory appeal based on qualified immunity from an order denying defendant's motion for summary judgment despite the fact that the order was "arguably not the kind of separate document contemplated by court rule 58 because it covers a wide variety of separate and independent decisions involved in the ongoing administration of the case and thus cannot be readily identified as a final appealable order within the intent of the court rule." *Id.* at 2. In *Martone v. Connecticut General Life Ins. Co.*, 983 F.2d 1056, 1992 WL 385245 (4th Cir. 1992), the court, contrary to Kidd's position, agreed that "a very brief order can serve as both the court's decision and the formal judgment required by Rule 58," although, under facts distinguishable from the present case, it held that "where, as here, the three page order contains a procedural history of the case and a somewhat lengthy statement of the court's reasoning, it is better classified as the court's opinion than as a Rule 58 judgment order." *Id.* at 2-3 n.2. In contrast, the order in the present case suffers from none of the defects noted by court. In *Woods v. Wal-Mart*, 124 F.3d 219, 1997 WL 527668 (10th Cir. 1997), the court held that a minute order entered on the docket denying plaintiff's motion to remand the case to state court *complied* with the separate document requirement and, hence, her notice of appeal was untimely, although the court excused the untimeliness under the "unique circumstances" doctrine. Again, this case hardly supports Kidd's position that the order in question violated the separate document requirement.

In an attempt to show the presence of "confusion" among the circuits on the issue, Kidd argues that courts have taken different factors into account in determining whether particular orders complied with Rule 58--namely, brevity, extent of citation to authority, legal analysis, and the intent of district court. Pet. 18-27. However, the order in question qualifies under any of these tests. As noted, the single, conclusory sentence contains no facts, law, or analysis. Moreover, the order completely disposes of all of Kidd's remaining claims, expressly granting summary judgment to defendants. It bears no resemblance to a memorandum or decision. Moreover, the order was separate from the district court's Memorandum Opinion, Pet.App. 39a-51a, and from the magistrate judge's Report and Recommendation analyzing the remaining claims, *id.* 52a-59a--both of which, in contrast, did contain detailed findings of fact, numerous citations of legal authorities, and analysis. Finally, it was clear that the district court intended its March 20, 1998 order granting defendants summary judgment as its final order; it issued no more orders in the case after that day.

Under these circumstances, no reasonable person could have been uncertain as to the finality of this. Nor was Kidd confused here; after she became aware of the order, she treated it as final judgment, filing a notice of appeal, although belatedly. As the D.C. Circuit aptly put it, "it is one thing to say that Rule 58 creates a straightjacket, another to define the straightjacket's precise measurements." *Id.* 6a. That court concluded that this was a "trivial departure" from the official judgment forms that "must be tolerated in the name of common sense." *Id.* 7a. The D.C. Circuit's decision is entirely consonant with the primary purpose of the separate document requirement to avoid uncertainties.

Therefore, the first question raised by Kidd has not created a conflict among the circuits or is otherwise of sufficient importance to warrant review by this Court.

**C. The D.C. Circuit's holding that the district court's adoption of the magistrate judge's report and recommendation did not violate the separate document requirement is supported by a majority of the circuits that have addressed the issue, and the decisions of three circuits to the contrary all addressed the issue in a very narrow context under unusual circumstances, which are unlikely to recur.**

Kidd's second question is whether a dispositive order of a district court that adopts the report and recommendation of a magistrate judge *ipso facto* violates the separate document requirement. This argument ignores the text and history of Rule 58, as well as the reasoned decisions of a majority of the circuits that have considered the issue. Even dissenting Judge Tatel agreed.[7] Although Kidd points to decisions of three circuits as evidence of a conflict, an examination of these cases shows that they concerned a very narrow context under unusual circumstances, which are unlikely to recur.

Kidd's argument assumes that, in order to satisfy this requirement, a district court must always enter two orders of its own and may not treat the report and recommendation as a

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[7]He acknowledged that "an order 'does not lose its character as a separate document simply because it includes a one-sentence explanation of what the order is all about, or a recital that a magistrate's report and recommendation are being adopted.'" Pet.App. 16a.

document from which its order is "separate" under Rule 58. However, this argument is undercut by the text and history of the separate document requirement.

The dictionary definition of the word "separate," as an adjective, includes "existing by itself" and "autonomous." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY at 1067 (10th ed. 1993). In this sense, the phrase "separate document" does not require the existence of another document from which the document must be separate. Similarly, the Advisory Committee Note to the 1963 amendment to Rule 58, *supra*, p.10, explains that the dispositive order must be "distinct from *any* opinion or memorandum" (emphasis added). The word "any" implies that there may not be an opinion or memorandum.

Moreover, the majority of the circuits that have addressed the issue have held that Rule 58 does not require that an order adopting a magistrate's report and recommendation be accompanied by a second order. See *Alman v. Taunton Sportswear Mfg. Corp.*, 857 F.2d 840, 842-843 (1st Cir. 1988); *Ellison v. Conoco, Inc.*, 950 F.2d 1196, 1200-1201 (5th Cir. 1992) ("Rule 58 was designed to function as a life-preserver rather than a heavy anchor"), *cert. denied*, 509 U.S. 907 (1993); *United States v. Perez*, 736 F.2d 236, 237-238 (5th Cir. 1984) ("The mere fact that the first sentence of the order adopts the magistrate's report and recommendation does not require that two documents be used by the district court rather than one"); *Mason v. Groose*, 942 F.2d 515, 516 (8th Cir. 1991), *cert. denied*, 502 U.S. 1039 (1992); *Laidley v. McClain*, 914 F.2d 1386, 1390 (10th Cir. 1990) ("The fact that the first sentence of the order adopted the report of the magistrate does not require that two documents be used instead of one"); *United States v. Clearfield State Bank*, 497 F.2d 356, 358-359 (10th Cir. 1974); *Diamond, supra*, 770 F.2d at 229-230.

Kidd points to three decisions of other circuits–*Kadelski v. Sullivan*, 30 F.3d 399, 400-02 (3d Cir. 1994); *Yang v. Shalala*, 22 F.3d 213, 216 (9th Cir. 1994); and *Newsome v. Shalala*, 8 F.3d 775, 775, 778-80 (11th Cir. 1993)–as evidence that there is a split among the circuits on this question. However, any split is limited in scope and unlikely to recur.

These cases all focused on the narrow issue of the timeliness of an application for attorney's fees under the Equal Access to Justice Act (EAJA) by Social Security claimants who obtained a district court order reversing and remanding an administrative decision under sentence four of 28 U.S.C. § 405(g), where the fee request was required "within thirty days of final judgment in the action," defined as "a judgment that is final and not appealable." 28 U.S.C. § 2412(d)(1)(B), (2)(G).

As the D.C. Circuit explained, these decisions were based on a misreading of *Shalala v. Schaefer*, 509 U.S. 292 (1993). In that case, the Secretary of Health and Human Services had taken the position that it did not really matter whether the separate document requirement was satisfied because a final order "became" appealable despite noncompliance with Rule 58 under the reasoning of *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385-387 (1978). *See Shaefer*, 509 U.S. at 303. Although the Court rejected the Secretary's reasoning, the parties did not raise, and this Court did not address, the issue of whether a district court's adoption of a magistrate's report and recommendation violated the separate document requirement. Nor did the Court even mention that the order in question adopted a magistrate's report and recommendation. *See* Pet.App. 7a-8a. Moreover, as the D.C. Circuit noted, *Newsome* "explicitly confined its reasoning to Social Security cases in general and more specifically to 'the narrow facts of this case,'" although *Yang* took "no position with regard to this limitation." *Id.* 7a.

A recurrence of factual situations similar to those facing these courts is unlikely. The courts were presented with an unusual situation created by an unforseen change in the law which was especially unfair to claimants. Through no fault of their own, the claimants were caught by this Court's reversal of the commonly accepted view that "sentence four" remand orders were not "final judgments." As *Newsome* explained:

> At the time this litigation was initiated, this circuit treated *all* remand orders from a district court to the Secretary as interlocutory orders, not as final judgments. . . . Thus, it was the district court's order after remand and return of the case from the Secretary that was the "final judgment" for purposes of the EAJA; the thirty days within which a claimant could file an application for attorney's fees under the EAJA began to run when this order became "final and not appealable."
>
> The Supreme Court has put to rest what is a final judgment in a Social Security case like the one before us in its cases of *Sullivan v. Finkelstein*, [496 U.S. 617 (1990)], *Melkonyan v. Sullivan*, [501 U.S. 89 (1991)], and *Shalala v. Schaefer*, [509 U.S. 292 (1991)]. If the district court enters a "sentence four" remand order, that judgment is appealable.

8 F.3d at 777-778 (emphasis in original). Since this Court's clarification of the law occurred after the time had expired under the clarified rules, the claimants were trapped, and the courts had an inducement to find a way out in the interest of fairness.

This situation has not recurred since this Court's clarification that "sentence four" remand orders were "final orders" from which

an appeal lies. Therefore, the apparent conflict between these cases and the decisions of the other five circuits mentioned is more fanciful than real. No other circuits have adopted the reasoning of these three decisions even in the narrow context of the timeliness of EAJA petitions for attorney's fees, let alone has any circuit applied these decisions to other contexts involving the separate document requirement. Therefore, Kidd has only pointed to a narrow and temporary conflict on this issue, one which does not threaten to recur, much less to expand beyond its origins.

Kidd also argues that this case is one of "exceptional importance" because the question of what constitutes a separate document is recurring, and disposition of civil actions on a magistrate's report and recommendation is commonplace. She cites statistics for the proposition that a large number of civil cases are referred to magistrate judges, Pet. 17, although she makes no attempt to estimate the number of cases involving the separate document requirement. However, the fact remains that, whatever the frequency with which this issue might arise, it has not generated conflicting circuit decisions.

Therefore, Kidd's second question, like her first question, does not warrant consideration by this Court.

## CONCLUSION

The petition should be denied.

Respectfully submitted,

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